Office - Supreme Court, U.S.
FILED
NOV 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-670

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THURMAN H. HOWARD,

Petitioner

v.

CENTRAL OF GEORGIA RAILROAD COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES A. HORSKY*
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5180
Attorney for Respondent
**Counsel of Record*

Of Counsel:
JOHN B. MILLER
P.O. Box 1567
Savannah, GA 31402

November 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that errors by the trial court in admitting evidence and in permitting inflammatory and prejudicial remarks by petitioner's counsel required reversal of its judgment.

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	2
STATEMENT	3
REASONS FOR DENYING THE WRIT	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	6
Anderson v. *L. & A. Ry. Co.*, 457 F.2d 784 (5th Cir. 1972)	5
Barnes v. *Norfolk Southern Ry. Co.*, 333 F.2d 192 (4th Cir. 1964)	5
Beanland v. *Chicago, R. I. & P. R.R. Co.*, 480 F.2d 109 (8th Cir. 1973)	5
Central Vermont Ry. v. *White*, 238 U.S. 507 (1915)	5
Hendley v. *Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980)	6
Kelly v. *New York, N.H. & H. R.R. Co.*, 138 F. Supp. 82 (D. Mass. 1956)	5
Minneapolis & St. Louis R.R. v. *Bombolis*, 241 U.S. 211 (1916)	5
Norfolk & Western Ry. Co. v. *Liepelt*, 444 U.S. 490 (1980)	5
O'Donnell v. *E. J. & E. Ry. Co.*, 338 U.S. 384 (1949)	3
Second Employers' Liability Cases, 223 U.S. 1 (1912)	5
Sharkey v. *Penn Central Transportation Co.*, 493 F.2d 685 (2nd Cir. 1974)	6
STATUTES:	
28 U.S.C. § 1257 (3)	3
Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*	3, 6
Railway Labor Act, 45 U.S.C. § 153 First (i)	6
Safety Appliance Act, 45 U.S.C. §§ 2, 5, 8	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-670

THURMAN H. HOWARD,

Petitioner

v.

CENTRAL OF GEORGIA RAILROAD COMPANY,

*Respondent**

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Georgia Court of Appeals is reported at 161 Ga. App. 560, 288 S.E.2d 347, and appears in the Appendix to the petition at A8-A13. The *per curiam*

* The listing of parent, subsdiaries and affiliates required by Rule 22.2 is as follows:

Southern Railway Company (parent)
Algers, Winslow and Western Railway Company
Atlantic and North Carolina Railroad Company
Augusta and Summerville Railroad Company

memorandum of the Supreme Court of Georgia and an opinion dissenting from denial of rehearing are reported at 249 Ga. 713, 293 S.E.2d 346, and appear in the Appendix to the petition at A1-A7.

JURISDICTION

The decision of the Supreme Court of Georgia vacating its grant of certiorari was entered on July 8, 1982, and

---

Beaver Street Power Company
Carolina and Northwestern Railway Company
Central Transfer Railway and Storage Company
Chatham Terminal Company
Cincinnati Southern Railway
1575 Eye Street Associates
High Point, Randleman, Asheboro and Southern Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
Norfolk Southern Corporation
The North Carolina Midland Railroad Company
The North Carolina Railroad Company
North Charleston Terminal Company
Pine Brook Center Limited
Queen City Developers
Richmond, Fredericksburg and Potomac Railroad Company
Richmond-Washington Company
700 North Fairfax Street Limited Partnership
The South Western Rail Road Company
State University Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Woodstock & Blocton Railway Company
Yadkin Railroad Company

rehearing was denied on July 22, 1982 (Pet. App. p. A1). The petition for certiorari was filed on October 15, 1982. Jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATEMENT

This action was begun by petitioner to recover for a personal injury under the Safety Appliance Act (45 U.S.C. §§ 2, 5, 8) and the Federal Employers Liability Act (45 U.S.C. §§ 51 *et seq.*). Petitioner, a locomotive engineer, was thrown from his seat onto his buttocks on the catwalk of his engine when a coupling broke and caused his train to collide with other cars. Under the Safety Appliance Act, proof of the fact that an appliance failed is proof of liability for any injuries proximately resulting from such failure. *O'Donnell* v. *E. J. & E. Ry. Co.*, 338 U.S. 384 (1949). The failure was admitted, leaving for the jury only whether the violation was a proximate cause of the injuries, and, if so, what damages should be awarded.

However, at the trial, counsel for petitioner, over continuing objections by respondent's counsel, devoted much of the time to vilification of respondent and Mr. Cogdell, its chief operating officer. Some time after the accident petitioner had been discharged by Mr. Cogdell for leaving his train and firing a .22 rifle on the property of an industry served by respondent (he was later reinstated, without back pay). Referring to this fact, and to the case of another employee who had allegedly been discharged for testifying against respondent in another F.E.L.A. action, counsel for petitioner repeatedly "cross-examined" his own employee witness to show that they were, or should be, afraid of Mr. Cogdell.

Petitioner's counsel, over objections, also indulged in what the Court of Appeals characterized as "abominably

inflammatory and prejudicial" argument. A sampling is contained in the Court of Appeals' opinion (Pet. App. pp. A11-A13), and need not be repeated here.

On the basis of the irrelevant and prejudicial material which the trial court had permitted to be introduced, and the inflammatory and prejudicial arguments of petitioner's counsel, the Court of Appeals reversed the judgment which had been entered on the jury verdict against respondent in the trial court (Pet. App. p. A13). After a petition for rehearing had been denied *(ibid.)*, petitioner filed a petition for a writ of certiorari to the Georgia Supreme Court. The Supreme Court granted the writ, indicating particular concern with the question "whether the dismissal of Howard by the railroad was relevant to the issues of disputed lost wages and/or future employability," but after plenary consideration it issued a *per curiam* opinion vacating the grant as not satisfying its criteria for certiorari ("cases of great concern, gravity and importance to the public" (Rule 28, Rules of Supreme Court of Georgia)) (Pet. App. p. A1). Rehearing was denied on July 22, 1982 *(ibid.)*.

REASONS FOR DENYING THE WRIT

This case utterly fails to satisfy the requirements justifying the grant of a petition for certiorari to a state court as set forth in Rule 17.1(a) and (b). It presents no conflict of decisions with any other court, and indeed raises no question of federal law.

1. The first of petitioner's assertions (Pet. pp. 6-7), that the court below refused to follow federal law as to damages bears no relation to the facts. At no time has there been any challenge to the well-settled principle referred to by petitioner that the measure of damages in a case such as this brought under federal statutes is a

matter of federal law. *Norfolk & Western Ry. Co.* v. *Liepelt*, 444 U.S. 490 (1980).

2. Petitioner's second contention (Pet. pp. 7-11), relates to the conclusion of the court below that petitioner's discharge for firing the .22 was irrelevant and prejudicial. Admissibility of evidence and prejudicial material are matters of state practice and procedure and raise no federal question just because the state court is enforcing a federal statute. *Second Employers' Liability Cases*, 223 U.S. 1, 56-57 (1912); *Central Vermont Ry.* v. *White*, 238 U.S. 507 (1915); *Minneapolis & St. Louis Ry.* v. *Bombolis*, 241 U.S. 211 (1916).

In any event, the court below was correct. Proof of lost time due to petitioner's discharge would not be proof of lost time due to his injury. Indeed, proof by petitioner that he had lost time due to his discharge, rather than his injury, would be defeating his claim, rather than supporting it. Moreover, as the opinion of the court below makes clear (Pet. App. pp. A9-A11), the evidence which the court held improperly admitted was not limited to the discharge of petitioner. His counsel also dealt at length on the discharge of another employee and sought to cross-examine a number of his own witnesses on the issue of threatened discharges. None of this was relevant to petitioner's claim for personal injury resulting from a Safety Appliance Act violation, and was highly prejudicial as well. The decision so holding is consistent with similar holdings by the federal courts. *Anderson* v. *L. & A. Ry. Co.*, 457 F.2d 784 (5th Cir. 1972); *Beanland* v. *Chicago, R.I. & P. Ry. Co.*, 480 F.2d 109 (8th Cir. 1973); *Kelly* v. *New York, N.H. & H. R.R. Co.*, 138 F. Supp. 82 (D. Mass. 1956). *Barnes* v. *Norfolk Southern Ry. Co.*, 333 F.2d 192 (4th Cir. 1964) is not to the contrary. The F.E.L.A. plaintiff in that action sought to prove that the

railroad had discharged him because of the disability resulting from the F.E.L.A. injury. The issue as to the discharge was, in consequence, directly related to the F.E.L.A. claim. That relation does not exist in the present case.

The other cases cited by petitioner furnish no support for his position. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) held that an adverse arbitral award by the Equal Employment Opportunity Commission did not bar an action to enforce rights under the Civil Rights Act. *Hendley* v. *Central of Georgia R.R. Co.*, 609 F.2d 1146 (5th Cir. 1980), similarly held that a court could enjoin a disciplinary proceeding when it was motivated by a retaliatory purpose in violation of § 60 of the F.E.L.A. No doubt, if petitioner was wrongfully suspended in connection with his action in firing the .22, he would have a claim against respondent for wrongful discharge by way of administrative proceedings under the Railway Labor Act. 45 U.S.C. § 153 First (i); *Sharkey* v. *Penn Central Transportation Co.*, 493 F.2d 685, 688 (2d Cir. 1974). But that claim has nothing to do with his action for damages resulting from personal injuries.

3. The decision below is also independently supported by the Court of Appeals' second conclusion: that "the conduct of this trial contained such extensive and grossly improper prejudicial remarks directed at the appellant [respondent], that it is impossible for us to say that the verdict was not infected with undue bias (Code Ann. § 105-2015)" (Pet. App. p. A11). This clearly raises no federal question reviewable by this Court.

CONCLUSION

The petition for certiorari presents no issues warranting review by this Court and should be denied.

Respectfully submitted,

CHARLES A. HORSKY*
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5180
Attorney for Respondent

**Counsel of Record*

Of Counsel:
JOHN B. MILLER
P.O. Box 1567
Savannah, GA 31402

November 1982